Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-109

NICHOLAS B. STEPHENS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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---

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit which was entered in the above case on April 22, 1976 as reiterated by the Order of the Court denying the petition for re-hearing issued on June 8, 1976.

OPINIONS BELOW

The orders of the United States Court of Appeals for the Sixth Circuit that the petitioner feels he is aggrieved by are unreported. They are attached to this Petition for Certiorari.

JURISDICTION

As stated earlier, the judgment of the Sixth Circuit Court of Appeals was initially made on April 22, 1976 and a petition for re-hearing was denied on June 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The sole question presented by the petitioner in this application for writ of certiorari is whether or not the Sixth Circuit erred in ruling that the petitioner did not having standing to contest the search and seizure of the controlled substance that was involved in this case.

STATUTES INVOLVED

The statute involved is 21 U.S.C. § 841(a)(1). This statute charged the defendant with intentionally and unlawfully possessing with the intent to distribute a controlled substance, to wit: a quantity of marijuana, a Schedule I controlled substance.

STATEMENT

I.

Summary of Proceedings

After the defendant's arrest on Christmas Eve of 1974, for unlawfully possessing with the intent to distribute or dispense, a controlled substance, to wit: marijuana, the defendant, NICHOLAS B. STEPHENS was indicted on January 23, 1975 in the United States District Court for the Middle District of Tennessee. That indictment was a two-count indictment alleging not only the possession with intent to distribute marijuana, but also possession with intent to distribute phencyclidine hydrobromide, a schedule III controlled substance. On February 18, 1976, the defendant STEPHENS filed a Motion to Suppress and a evidentiary hearing was held on this Motion on March 6, 1975. It is this Motion to Suppress that constitutes the primary basis for the appeal of the defendant STEPHENS. On April 29, 1975, the Honorable Frank Gray, Jr., Judge for the Middle District of Tennessee entered an Order denying this Motion to Suppress.

Thereafter, on August 7 and 8, 1975, trial was held in this matter and both defendants were convicted of Count One of the two-count indictment. The defendant STEPHENS was found not-guilty of the second count of the indictment. The defendant NICHOLAS STEPHENS duly perfected his appeal to the Sixth Circuit Court of Appeals in Cincinnati. That Court, in essense, ruled that the defendant – petitioner herein – did not have standing to contest the searches involved in this matter. The Petition for Re-Hearing was duly

filed and the Sixth Circuit Court of Appeals denied an application for re-hearing on June 8, 1976.

II.

Summary of Facts

On December 21, 1974, agent John B. Dobson of the San Diego Police Department was contacted by American Airlines officials that two suspicious foot-lockers, possibly containing marijuana, were at the American Airlines freight section of the San Diego International Airport. (A-5).

The agent was contacted at 5:30 A.M. that the two trunks were on trams at the freight building. (A-10). At that time he and his assistant, Agent William Flores, also of the San Diego Police Department, arrived at the Air Freight office at 6:10 A.M. The agents were informed that this particular flight would be departing for Nashville, Tennessee, at approximately 7:40 A.M. Agent Dobson testified that as a matter of routine, he did attempt to obtain search warrants in situations of this nature. (A-6).

Due to the odor of marijuana, the agents decided to open the trunks at 6:30 A.M. (A-7). After detecting what they thought was the ordor of marijuana, the agents took the trunks off the tram and immediately opened them. The agents indicated that roughly three minutes elapsed from the initial smell of the purported marijuana until the efforts began to force open the locked trunks. The forcible entry was made by means of a screw-driver, punch and hammer. (A-12, 13). Eighty-nine (89) kils packages were found in the two trunks. (A-28, A-64).

The agents apparently attempted to get the trunks back on the original flight to Nashville, but were unable to do this and the trunks left on a substantially later flight. (A-43). The San Diego Agents who both were also Deputy United States Marshalls (A-20), indicated that their only basis for seizing the trunks at this time was the odor of marijuana, possibly mingled with the odor of talc from one of the packages. (A-11). Agent Dobson of the airport detail, did testify that he had detected odors that he had thought that were marijuana but turned out to be something that was only similar. (A-11).

No effort was made to secure a search warrant at any time by any officer involved. As Officer Bodson testified to, "In my own mind, I felt I had enough probable cause to open these trunks." (A-15). Agent Flores testified similarly that, "Under the circumstances, I felt we didn't need a search warrant." (A-41). Agent Flores earlier testified that the question of the search warrant, "didn't come to my mind." (A-40). It was admitted upon questioning by the Honorable Judge Gray that no attempt was made to contact anyone pertaining to a search warrant. (A-32, 33).

Upon questioning by the attorneys for the defendants, and the Court, the San Diego agents indicated that since this was a Saturday, that it would be difficult to possibly obtain a search warrant. The testimony indicated that from the location of the trunks with the controlled substance, that it was approximately one and one-half miles to either a San Diego Courthouse or to a United States magistrate, and that it would take approximately five to ten minutes to drive into these judicial headquarters. (A-18, 21, 22, 48). The facts indicated that the standard procedure to obtain a search

warrant in San Diego County, was to call the Sheriff's business office, who in turn would refer the agent to a Deputy District Attorney, who at that time, would attempt to locate a Judge to attempt to execute a telephonic search warrant. (A-8). Agent Dobson indicated that it might have taken two and one-half to three hours to have obtained a search warrant. (A-7). The agents further testified that the standard policy of law enforcement personnel was to go only through certain set channels. That being either through the Sheriff's office or through the office of the United States Attorney. It was indicated that attempting to contact a Judge of magistrate in person was frowned upon, and that, "it isn't done that way in San Diego County." (A-46). Agent Flores indicated that while a few agents that he was personally aware of, had gone directly to a Judge's home to obtain a search warrant, that, "they have been told to follow the proper procedures." (A-47). Agent Flores went on to add, however, once again, that no effort was made to contact any magistrate or Judge of any kind, either State or federal, to obtain a search warrant, since, in his opinion, "we didn't think we needed a search warrant." (A-50).

It was indicated that certain forms which facilitated the obtaining of a search warrant were only seven to eight minutes away from the airport. (A-52).

Testimony further indicated that although the American Airlines officials had been extremely cooperative in this matter, and had removed the trunks out of the normal system of freight, that the American Airline officials were never asked if it would be possible to detain these trunks for the purpose of getting a search warrant, assuming that American Airlines had the final

discretion in this matter. (A-15, A-41, A-52). Agent Dobson did testify, however, that if he had gone to get a search warrant that he would have considered the trunks seized by his partner, Agent Flores. (A-30).

At this time, the trunks, minus one kilo of marijuana, were allowed to proceed to their apparent destination in the Middle District of Tennessee.

EVENTS SUBSEQUENT TO TRUNKS ARRIVAL IN MIDDLE DISTRICT OF TENNESSEE

The trunks in question, no longer in the physical custody of the San Diego agents, apparently arrived in Nashville, on or about the 22nd of December, 1974. At this time, Agent Francisco Guzman of the D.E.A. office in Nashville, was notified of their arrival. (A-66). Agent Guzman had previously determined, partially upon the advice of an Assistant United States Attorney for the Middle District of Tennessee, that it would not be necessary to make any effort to obtain a search warrant for the trunks upon their arrival in Nashville. (A-77). The trunks were left at the Metropolitan Nashville Airport, except for certain times when they were loaded into a government van and moved back to the D.E.A. office rather than remaining at the airport. (A-67). On December 24, 1974, a female caller left word with the freight agency in Nashville that someone would soon pick up these packages (A-82), and the co-defendant in this matter, Ernest Brackeen, physically signed for the packages that were under surveillance on the evening of December 24, 1974. (A-73).

The defendant Brackeen was placed under arrest at that time and he and the packages were transported

back to the D.E.A. office in downtown Nashville. From this time forward, the defendant Brackeen was acting pursuant to the directions of the Drug Enforcement Administration officers in Nashville. (A-95). The contents of the trunks were secured by the D.E.A. officials with the exception of one kilo package left in each of the two trunks. (A-86).

The co-defendant Brackeen, at this time, accompanied by local officers, drove to Hendersonville, Tennessee at approximately 8:20 P.M. At this time, the testimony indicates that another subject, identified by one officer as being NICHOLAS STEPHENS, came out to apparently discuss something with Brackeen.

Detective Sergeant David Key of the Hendersonville Police Department indicated that while both subjects were in the vicinity of the trunks in question that he could not detect any movement of the trunks. His notes reflected that the co-defendant Brackeen yelled something to the effect of, "Run", to an unidentified female near the activity. Officer Key indicated that he felt his original notes were in error and that it might have been the defendant NICHOLAS STEPHENS. Officer Key indicated that he did not see the trunks moved by the subjects. (A-97 – A-111).

Officer Donald Cochran, who was in the car with Officer Key, indicated that the co-defendant Brackeen had generally stated, "that the marijuana was not all his, that he didn't feel like he should take the whole rap for the marijuana." (A-117).

Officer Cochran further testified that the defendant STEPHENS walked over and placed his hands on the trunk at which time he was placed under arrest and that STEPHENS, at that time, yelled something to the effect, "Run", to the unidentified female subject.

Officer Cochran further testified that on one occasion he saw STEPHENS grab one of the trunks with both hands and start to shake it. (A-119 – A-127).

There was no evidence of any statement being made by the defendant STEPHENS contrary to his self-interest, or any statement made by the defendant Brackeen to the detriment of the defendant STEPHENS.

The government called for its toxicology proof, Mr. Wilmer Kiser, a forensic chemist for the Drug Enforcement Administration. There was no dispute as to his qualifications and he testified that of the representative samples from the eighty-seven (87) kilo bags that he observed, only twenty were analyzed. There was no evidence that one of the twenty that was analyzed by Mr. Kiser was in the trunks that arrived in Hendersonville, Tennessee where the defendant STEPHENS allegedly resided. (A-131).

As its concluding witness, the government called a Mr. James Leon Parker, Jr., who testified that he had previously dealt in narcotics with both defendants, Brackeen and STEPHENS, and that he had brought suitcases of marijuana to Nashville for the defendant STEPHENS and had seen similar trunks in the apartment resided in by the defendant STEPHENS. This witness indicated that he had initially made these unlawful activities of his own known to military authorities in order that he could get out of the Marine Corps. (A-133 - A-156).

REASON FOR GRANTING THE WRIT

The petitioner contends that the Court of Appeals misapprehended the ruling in *United States v. Hearn*, 496 F.2d 236 at 241, as it applies to the facts in this case.

A. The decision in United States v. Hearn, supra, does not require that the instant case be dismissed for lack of standing.

The Court of Appeals cited the case of *United States v. Hearn*, 496 F.2d 236 at 241 (6th Cir. 1974), as authority for their ruling that the defendant NICHOLAS STEPHENS did not have standing to contest the search. The rule is apparently stated by referring with approval to *Brown v. United States*, 411 U.S. 223, 93 S. Ct. 1565, 36 L.Ed.2d 208 (1973). In that decision, the Court stated:

> "[T]here is not standing to contest a search and seizure where as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) had no propriatary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure . . .". 411 U.S. at 299, 93 S. Ct. at 1569, 36 L.Ed.2d at 214.

Assuming that the quoted language is a correct statement of the rule, it does not lead to a lack of standing in the instant case. The record in this case shows that the United States attorney offered proof through the testimony of one James Parker that the defendant NICHOLAS STEPHENS, was directly

responsible for previously having trunks containing marijuana at the San Diego airport for shipment to Nashville, Tennessee. (GOVT. APPENDIX A-23 - A-3U). Had the government not introduced this testimony, then the rules as announced in *Hearn, supra,* and *Brown, supra,* might preclude standing on the part of this defendant. It seems manifestly unfair, however, for the government to argue that the defendant is responsible and is the actual owner of the trunks in question for the purposes of convincing a jury; but then to ask that this testimony be disregarded on appeal so as to deny standing to the defendant to contest the very search at issue.

To challenge the admissability of evidence because of a Fourth Amendment violation, an individual must be a "person aggrieved." F.R.CRIM.P. 41 (e). A "person aggrieved" is one who is "a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered at the consequence of a search or seizure directed at someone else." See *Jones, supra,* 362 U.S. at 261, 80 S. Ct. at 731, 4 L.Ed. 2d at 702.

The *Hearn* decision can be distinguished since in that case the Appellants were attempting to object to a search of their co-defendant's premises, and the evidence obtained as the result of the search was properly admitted as to them. In the present case, the defendant, NICHOLAS STEPHENS, is a person, as the evidence indicates, as to whom the search was actually directed. The *Hearn* decision indicates that the current status of the law as to standing on a search question is largely governed by the case of *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L.Ed.2d 176

(1968). *Alderman* indicates that Fourth Amendment Rights are personal rights, which, like some other constitutional right, may not be vicariously asserted. The defendant STEPHENS does not quarrel with this proposition of law, but would point out that he was not asserting the right of another party or defendant, but rather for himself. The government introduced evidence that Mr. STEPHENS was responsible for the items being in San Diego and that he was directly responsible for their presence.

Possibly, it was for this reason that the government, at the trial level, did not object to the standing of the defendant STEPHENS to contest the search. The government realized that it obviously would be inconsistent for them to introduce proof that Mr. STEPHENS was responsible for the items being in the San Diego airport where they were searched, but yet to argue at the trial level that he would not have standing to object to his trunks being searched when they arrived in Nashville. The defendant strongly contends that the government has offered testimony that stood unrefuted that Mr. Stephens was in all likelihood responsible for the trunks being in San Diego and based upon the testimony introduced by government witnesses, that they themselves have conferred standing upon Mr. Stephens to contest the search in San Diego.

CONCLUSION

For the reasons above, the petitioner contends that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BARRETT, BRANDT & BARRETT,

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CERTIFICATE OF SERVICE

I, Lionel R. Barrett, Jr., Attorney for the Petitioner, Nicholas B. Stephens, hereby certifies that on the 23rd day of July, 1976, I served a copy of the foregoing Petition for Writ of Certiorari to the Solicitor General of the United States, United States Department of Justice, Washington, D.C., 20530, by mailing a copy of same in a duly addressed envelope, postage prepaid.

LIONEL R. BARRETT, JR.

Appendix A

No. 75-2207

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
NICHOLAS B. STEPHENS,	)	
Defendant-Appellant.	)	

Before: CELEBREZZE, PECK and ENGEL, Circuit Judges.

Appellant having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

It is ORDERED that the petition for rehearing be, and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
JOHN P. HEHMAN, CLERK

No. 75-2207
75-2208

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,)

v.)

NICHOLAS B. STEPHENS,)

Defendant-Appellant,) ORDER

----------)

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,)

v.)

ERNEST BRACKEEN,)

Defendant-Appellant.)

Before: CELEBREZZE, PECK and ENGEL, Circuit Judges.

Appellants were convicted in the District Court for the Middle District of Tennessee by a jury of possessing marihuana with the intent to distribute, in violation of 21 U.S.C. §841(a)(1). Appellants raise a number of issues in their briefs and argument to the Court.

Appellants' primary contention is that marihuana was discovered by virtue of an unreasonable warrantless search at the San Diego International Airport. Neither Appellant was in San Diego at the time of the search and the marihuana was contained in two foot lockers addressed to a person other than either Appellant. Appellants lack standing to challenge this search. *United States v. Hearn*, 496 F.2d 236, 241 (6th Cir. 1974).

A review of the record, briefs, and arguments indicates that Appellants' remaining contentions are without merit.

It is therefore ORDERED that the judgment of the District Court be, and it hereby is, affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
JOHN P. HEHMAN, CLERK

Supreme Court, U. S.
FILED
AUG 26 1976
MICHAEL RODAK, JR., CLERK

NOS. 76-109 AND 75-6809

In the Supreme Court of the United States

OCTOBER TERM, 1976

NICHOLAS B. STEPHENS, PETITIONER

v.

UNITED STATES OF AMERICA

ERNEST D. BRACKEEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-109

NICHOLAS B. STEPHENS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-6809

ERNEST D. BRACKEEN, PETITIONER

v.

UNITED OF AMERICA

OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1976. Petitioner Brackeen's petition (No. 75-6809) was not filed until May 24, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court. Petitioner Stephens' petition for rehearing was denied on June 8, 1976. His petition for a writ of certiorari (No. 76-109) was filed on July 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners have standing to object to the search at an airport freight depot of two foot lockers containing marijuana that were addressed to

another person, when the search was made three days before petitioners were arrested and charged with taking possession of the marijuana in another state, and, if they have standing, whether there were exigent circumstances justifying the search.

2. Whether, in instructing the jury about petitioner Brackeen's alleged possession of marijuana with intent to distribute, the trial court erred in refusing to charge that simple possession of narcotics was, on this record, a lesser included offense.

3. Whether the trial court properly rejected petitioner Brackeen's claim that his in-court identification was irreparably tainted.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioners were convicted of possessing 187 kilos of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). They were both provisionally sentenced to five years' imprisonment pending a sentencing study pursuant to 18 U.S.C. 4208(b). The court of appeals affirmed in a brief order (Stephens Pet. 2a-3a).

1. On three occasions in the fall of 1974, James Parker, Jr., who testified for the government, was employed by petitioner Stephens as a courier at $500 per trip to carry suitcases filled with marijuana from Edward Kelly of San Diego, California, to petitioner Stephens in Nashville, Tennessee, and then to return to San Diego with ten or eleven thousand dollars (Tr. 157-159). On the first trip, Parker was accompanied by petitioner Stephens from Nashville to San Diego (Tr. 158). At the time, petitioner Stephens purchased some small trunks (Tr. 144, 145, 158). On another occasion, Parker observed some of these small trunks

in petitioner Stephen's apartment in Hendersonville, Tennessee (Tr. 145, 161). Parker later met petitioner Brackeen at Stephens' apartment (Tr. 160-162).

On the third trip, Parker flew from San Diego to Chattanooga where, after his arrival, he and petitioner Brackeen cut the marijuana up and re-packaged it into bags (Tr. 164). Petitioner Brackeen then drove Parker and petitioner Stephens to Brackeen's apartment in Murfreesboro, where Brackeen left some of the marijuana (Tr. 165). Brackeen then drove Parker and Stephens to the latter's apartment, where the rest of the marijuana was unloaded. It was later moved out of the apartment (Tr. 165). At that time, petitioner Stephens told Parker that Stephens was going to start sending the marijuana in trunks without a courier in order to reduce expenses (Tr. 166).

2. Thereafter, at about 5:30 a.m. on Saturday, December 21, 1974, airline employees at the San Diego International Airport, who were loading baggage onto a pre-Christmas freight flight to Dallas, Texas, summoned local police officers to investigate two trunks which smelled like narcotics (Tr. 7; Suppression Hearing ("Supp. Tr.") 4-5, 33, 34). By 6:30 a.m., two police officers had carried the trunks inside an airplane hangar and identified a strong odor of a bulk quantity of marijuana emanating therefrom (Tr. 8; Supp. Tr. 6, 51). The airline employees informed the officers that the shipper of the trunks had specifically requested that the trunks leave on the 7:40 a.m. flight to Dallas and that in order to accomplish that goal, the trunks would have to be loaded in a short time (Supp. Tr. 8, 51-53).

The officers, who testified that it would have taken at least three hours to get a telephonic search warrant on that Saturday morning (Supp. Tr. 6-7), decided to search the trunks without delay in order to try to

"put [the trunks] back on the same flight as if nothing had happened out of the normal as far as shipping time" (Supp. Tr. 52). By 6:45 a.m., the police officers had opened the locked trunks, removed one kilo of marijuana from each of the trunks, which contained a total of eighty-nine kilos of marijuana, and returned the trunks to the freight area fifty-five minutes before the 7:40 a.m. departure time (Tr. 8, 15; Supp. Tr. 27-28). Shortly after the search the police officers learned that the trunks would not be shipped until a later flight because of the heavy volume of pre-Christmas mail (Supp. Tr. 33-34).

On December 22, 1974, the trunks arrived at the Nashville airport (Tr. 19-20). At 4:55 p.m. on December 24, 1974, a woman called to verify that the trunks, destined for Ronnie Harper, Route 4, Springfield, Tennessee, had arrived (Tr. 9, 25, 42). At about 6:00 p.m., petitioner Brackeen came to collect the two trunks. He was arrested after he had signed a receipt for the trunks with the name "Ronnie Harper" and had loaded the trunks into the back of his pickup truck (Tr. 25-26, 38, 48).

Shortly thereafter, Brackeen decided to cooperate with the arresting officers (Tr. 29). Each trunk was emptied of all but one package of marijuana and reloaded into petitioner Brackeen's pickup truck (Tr. 64). On the way to petitioner Stephens' apartment in Hendersonville, petitioner Brackeen told one of the police officers that "the marijuana was not all his [and] that he didn't feel like he should take the whole rap * * * " (Tr. 107).

After setting up surveillance at the apartment complex where petitioner Stephens lived, the officers observed both petitioners emerge from the building. As petitioner Stephens shook one of the trunks in the back of the

truck, the officers arrested him (Tr. 109-110, 117). Petitioner Stephens then shouted to a woman standing at the entrance to the apartment complex, "Run. It's the police" (Tr. 110-112, 119). The woman was not apprehended. The door to Stephens' apartment was ajar and inside the officers found additional trunks, two packages of barbiturate pills and about one ounce of marijuana—or nearly twice as much marijuana as the amount state law allowed for personal use (Tr. 114-116, 122, 140-141).

ARGUMENT

1. (a) The indictment charged petitioners with possession of marijuana with intent to distribute on or about the day they took possession of the two foot lockers, December 24, 1974. As the court of appeals correctly held, neither petitioner has standing to contest the search of the two trunks at the San Diego International Airport three days earlier, on December 21, 1974. At that time, the trunks were addressed to a third person, the search occurred out of petitioners' presence, on premises in which they had no proprietary interest, and petitioners' possession of the seized evidence at the time of the search was not an essential element of the offense charged. Under *Brown* v. *United States*, 411 U.S. 223, 228-229, they therefore lacked standing.

Despite the government's objection to petitioners' standing to object to this search (Supp. Rec. on Appeal, Item No. 34), neither petitioner offered any evidence at the suppression hearing or at trial to show that they, rather than, for example, their San Diego supplier, Edward Kelly, had a possessory interest in the trunks at the time of the search. Petitioner Stephens now asserts, however, that the government presented unrefuted testimony that he was in all likelihood responsible for the trunks being in San Diego and that the govern-

ment's case thus conferred standing upon him to contest the search in San Diego (Stephens Pet. 12).

The government's evidence, however, showed only that several months earlier petitioner Stephens had purchased other smaller trunks. The mere "likelihood" that petitioner Stephens or petitioner Brackeen or Edward Kelly or addressee Ronnie Harper may have owned the trunks is not sufficient to give petitioners standing to contest the search. As this Court stated in *Brown* v. *United States*, *supra*, 411 U.S. at 228-229, "petitioners in this case could have asserted, at the pretrial suppression hearing, a possessory interest in the goods * * * without any danger of incriminating themselves. They did not do so. * * * Petitioners * * * failed to allege any legitimate interest of any kind in * * * the merchandise seized."

(b) Even if petitioners have standing to contest the warrantless search of the trunks, the search was justified by exigent circumstances.

Petitioner Brackeen complains that the one hour and ten minutes between the discovery by the police officers of the strong odor of marijuana emanating from the trunks at 6:30 a.m., and the departure of the Dallas flight at 7:40 a.m., was sufficient time to get a warrant, and that in any event the officers should have detained the trunks until the next flight while they obtained a warrant. But the officers were informed that the shipper had given specific instructions that the trunks were to be shipped on the 7:40 a.m. flight. Failure to accomplish that goal, which required almost immediate loading of the trunks, might have exposed the police surveillance and jeopardized the attempt to apprehend the intended recipients of the marijuana. In these exigent circumstances, where there was almost no time to get a warrant or to delay shipment of the trunks, the immediate

execution of the search was reasonable. See *United States* v. *Valen*, 479 F. 2d 467, 471 (C.A. 3), certiorari denied, 419 U.S. 901; *Clayton* v. *United States*, 413 F. 2d 297, 298 (C.A. 9, 1969).[1] After the search was made, and the trunks were put back into their place in the stream of outgoing freight, they nevertheless missed the 7:40 a.m. flight; but this did not render unreasonable the police officers' prior determination that an immediate search was warranted in the circumstances.

2. Petitioner Brackeen contends that the trial court improperly refused to instruct the jury that they could find him guilty of the lesser-included-offense of simple possession of narcotics. He argues that the evidence offered at trial would permit a jury rationally to conclude that he had no intent to distribute eighty-seven kilos of marijuana but rather that he intended to keep it for his own personal use.[2]

Petitioner Brackeen offered no evidence on this issue at trial and the uncontradicted evidence offered by the government showed that petitioner Brackeen admitted that the bulk quantity of marijuana of which he took delivery "was not all his" (Tr. 107). In addition, there was evidence that petitioner Brackeen had previously

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[1]Since there were exigent circumstances for the search of the trunks, there is no reason for the Court to hold this case pending the disposition of the government's petition for certiorari in *United States* v. *Chadwick*, No. 75-1721, where the government has argued that even in the absence of exigent circumstances, such trunks—by their very nature—are subject to an immediate search.

[2]Petitioner's oral request for this instruction was denied on the ground that the indictment charged possession of a "controlled substance," not "narcotics" (Tr. 200-201). Even if the language of the requested instruction had been amended, however, there was no evidence to support it.

helped petitioner Stephens receive and "cut" for redistribution other commercial quantities of marijuana. In these circumstances, where there was no evidence which could rationally support a jury finding that petitioner possessed the eighty-seven kilos of marijuana for his own personal consumption, the district court correctly refused to instruct the jury on the offense of simple possession. *Keeble* v. *United States*, 412 U.S. 205, 208; *Sansone* v. *United States*, 380 U.S. 343, 354-355.

3. Petitioner Brackeen further contends that the trial court erred when it refused to strike an in-court identification of him by government witness Parker. Petitioner Brackeen asserts that Parker's reliability had been irreparably tainted on the day prior to trial when Parker was shown and identified a photograph of Brackeen.

The evidence at trial showed that Parker had dealt with Brackeen while making two marijuana deliveries to petitioner Stephens. On the first occasion, Parker saw Brackeen in Stephens' apartment handling several pounds of the marijuana which Parker had just delivered and which were "ready to go on the street" (Tr. 153). On the second occasion, Brackeen and Parker together cut up and repackaged a commercial quantity of marijuana and then Brackeen drove Parker from Chattanooga to Hendersonville.

On the day prior to trial, Parker identified Brackeen's photograph, stating that "it was [petitioner Brackeen] with his beard shaved off" (Tr. 178). Subsequently, Parker identified Brackeen at trial (Tr. 146, 162, 180).

This is not a case where a witness is relying upon a fleeting glance to identify an otherwise unknown suspect.[3] Here Parker was identifying a person with whom he

[3]There is thus no occasion to defer disposition here pending the outcome in *Manson* v. *Brathwaite*, No. 75-871, certiorari granted, May 3, 1976, which involves the effect of impermissibly suggestive out-of-court and in-court identification procedures.

had spent a considerable amount of time while engaged in illegal activities. Moreover, there was ample other evidence at trial which corroborated Parker's identification of Brackeen as a business associate of Stephens.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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